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**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF  
CALIFORNIA**

Order Instituting Rulemaking to Consider the  
Adoption of a General Order and Procedures to  
Implement the Digital Infrastructure and Video  
Competition Act of 2006.

Rulemaking 06-10-005

**CITY OF OAKLAND'S APPLICATION FOR REHEARING  
OF DECISION 07 -03-014**

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Pursuant to Rule 16.1 of the California Public Utilities Commission (“Commission” or “CPUC”) Rules of Practice and Procedure (“Practice/Procedure Rules”), the City of Oakland, California (“Oakland”) respectfully submits this Application for Rehearing of Decision (“D.”) 07-03-014 which implements the Digital Infrastructure and Video Competition Act of 2006 (“DIVCA”).

## I. INTRODUCTION

DIVCA adds Division 2.5 (commencing with Section 5800) to the Public Utilities Code (Section 3 of Public Utilities Code (“PU”) section 444).<sup>1</sup> Section 5820 (c) of the Code provides in relevant part:

***“This division shall not be construed as granting authority to the Commission to regulate the rates, terms and conditions of video service, *except as explicitly set forth in this division.*”*** (Emphasis added.)

Based on the plain, unambiguous language of PU §5820(c), all interpretations or constructions of the DIVCA in D.07-03-014 that reflect the Commission’s assumption of authority, “not explicitly set forth” in Division 2.5 of the PU Code constitutes legal error in this Commission decision and, upon rehearing, should be corrected and/or removed from the Decision and the attached General Order 169 (D.07-03-014, Appendix B).<sup>2</sup>

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<sup>1</sup> Unless designated otherwise, all California statutory references hereafter are to the Public Utilities Code.

<sup>2</sup> Pursuant to Section 16.1(c) of the Practice/Procedure Rules,

“Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law. *The purpose*

As explained more fully below, the following determinations represent Commission overreaching in D.07-03-014 and constitute legal error, in violation of the above-quoted PU §5820(c):

1. CPUC grants incumbent cable operators the option of extending expired or expiring local franchises until January 2, 2008 if the incumbent operator applies for a state video franchise before January 2, 2008. (See D.07-03-014, pp. 14-23, related Fact 3, 5, 6, 7 and 8 and Conclusions of Law 7, 15, and 16;
2. CPUC rules that, after January 2, 2008, only the Commission can grant a video service franchise to operate within the state of California. (See 07-03-014, pp 9-13 and related Conclusions of Law 4, 5, 7 and 8).

#### **I. THE CPUC HAS NO AUTHORITY TO EXTEND LOCAL FRANCHISES<sup>3</sup>**

Section 5930 (b) of the Public Utilities Code provides:

“When an incumbent cable operator is providing service under an expired franchise or a franchise that expires before January 2, 2008, ***the local entity may extend that franchise on the same terms and condition through January 2, 2008. A state franchise issued to any incumbent cable operator shall not become operative prior to January 2, 2008.***” (Emphasis added.)

The plain language of DIVCA provides local entities, the local franchising authority, the option of acting unilaterally to extend through January 2, 2008 the franchises of incumbent cable operators that expire prior to that date. First, it is

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*of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.”* (Emphasis Added.)

<sup>3</sup> Although the DIVCA authorizes the Commission to renew state franchises, the terms of which are clear in the statute, franchise renewal is an entirely different action and procedure from that of extending an existing franchise, the substance of which is unknown to the Commission.

significant that DIVCA allows local entities the authority to extend franchises “through” (meaning after or beyond January 2, 2008), not merely “to” January 2, 2008.<sup>4</sup> Second, the Commission has no idea what mischief it might create by arbitrarily authorizing the imposition of a franchise extension on an unwilling local franchise authority. Clearly DIVCA does not grant The Commission any authority over incumbent cable operators prior to January 2, 2008, and least of all, authority over the terms and conditions of their franchises with local entities.

Local franchises are contracts - to which the Commission is not a party – the substance of which, the Commission is completely ignorant. Yet, D.07-03-014 erroneously ignores the DIVCA’s grant of franchise extension authority “only” to local franchising authorities. Finding of Fact 7 and Conclusion of Law 16 reverse DIVCA’S balance of power by allowing incumbent cable operators the right to extend local franchises to January 2, 2008 when the incumbent applies, before that date, for a state video franchise. According to the CPUC, the rationale for this legal error resides in the Assembly Analysis of DIVCA (See Findings of Fact 7 and Conclusions of Law 16.). While the Assembly Analysis is itself erroneous, fortunately, it is not the law. If the Legislature had intended that incumbent cable operators have franchise extension power, the DIVCA would have said so. The Commission has no authority to interfere with the terms and conditions of local

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<sup>4</sup> Although Conclusion of Law 15 accurately states the elements of PU §5930(b), the CPUC apparently misperceives that such extension would end January 2, 2008 as reflected in the concern that incumbent video providers (“incumbent”) be permitted to apply for state video franchises before January 2, 2008. This misconstruction is consistent with the Commission’s confused and erroneous conclusion that after January, 2008, the CPUC is the only video provider franchising authority in the state.

franchises before January 2, 2008, and thereafter, the Commission's power is limited to specific conditions as expressed in the written law, not in the conjecture of an Assembly aide.

Usurpation of the local entities' exclusive franchise extension authority demonstrates the Commission's misunderstanding of DIVCA's limitation of the CPUC's powers as expressed in section 5820(c) of the Code. In this case, the commission's overreaching arises from unwarranted concern for the so-called "legal limbo" of the video provider (Finding of Fact 8). The Commission has made assumptions about the state of expired franchises but is unaware of the prevailing law. The truth is the video provider has all the legal protection that a month to month renter or tenant has after his or her lease has expired. In addition they have protections of the Federal Cable Law.

In *Comcast of California vs. City of Walnut Creek*, 371 F. Supp.2d 1147, 1157 (May 5, 2005, USDC, N. D., California), the federal court considered the rights under federal cable law of a cable television service provider with an expired franchise. The provider claimed an ongoing right to upgrade or rebuild its system in the municipality's right of way. In holding that the provider did not have the rights available to a current franchise, the court noted that the video provider was "a mere holdover tenant. It is not a current franchisee. The cited statutory rights do not apply." (*Id.* at 1157).

In its concern for the legal status of incumbent operators, the Commission seems oblivious to how it could adversely impact a local entity by imposing the

extension of an expired franchise. A local entity may choose to not extend an expired franchise for numerous reasons. One basis might be the malfeasance of a provider. In other cases, local ordinances, developed over the years, to provide special privileges or procedures for current franchisees could be inappropriate, unfair or even harmful if arbitrarily extended to others, including holders of an expired franchise. To protect itself from the impact of an undesirable franchise extension, the local entity could be forced to employ the franchise termination provisions contained in the franchise agreement. Franchise termination can be an expensive and disruptive process for the service provider, the very entity that the CPUC was trying to protect.

## **II. THE COMMISSION IS NOT THE SOLE FRANCHISING AUTHORITY IN THE STATE**

D.07-03-014 erroneously concludes that as of January 2, 2008, the Commission is the only government entity that may grant a video service provider a franchise to operate within California (D.07-03-014, Conclusion of Law 4). This conclusion goes beyond the legislative mandate in section 5840(c) of the Code which is the only DIVCA provision that restricts the franchise application of prospective video providers to CPUC issued, state video franchises.

As stated in the plain, unambiguous language of that statute, after January 1, 2008, CPUC issued state video franchises are restricted **only** to prospective video providers who have not previously received or “been issued” a video service franchise:

“Any person or corporation who seeks to provide video service ***for which a franchise has not already been issued***, after January 1, 2008, shall file an application for a state franchise with the commission.” (PU § 5840(c), Emphasis added.)

The Commission supports its erroneous conclusion by pointing to the Assembly Bill Analysis which, as previously noted, is not the law. The intention of the Legislature must first be ascertained from the black letter law the legislators passed.

The Commission also claims that its conclusion is supported by PU§ 5840(a) which provides: “The commission is the sole franchising authority for a ***state franchise to provide video service under this division***.” (Emphasis added.) Clearly this section only says that the Commission is the sole franchising authority under the Code division that provides for state franchises. That does not mean the CPUC is the only franchising authority in the state of California.

Furthermore, the Commission’s rationale is undermined by the very statute it cites. The Commission erroneously ignores the remaining provisions of Section 5840(a), which further clarifies that DIVCA is intended to apply only to state franchises. Notably, at the end of PU §5840(a) is the caution that three Government Code provisions “[s]ections 53066.01, 53066.2 and 53066.3 . . . shall not apply to holders of a state franchise.” These Government Code provisions relate to cable television franchise fees, cable television service and conditions for granting cable television franchises. If the Legislature had really intended that the CPUC be the only video franchising authority in the state of California, it would

have repealed or appropriately sunset the Government codes; there would have been no need to mark them as “not applicable” to state franchises. Therefore, it seems clear that the DIVCA does not intend to repeal the local franchising authority under the Government Code.

There is nothing in DIVCA that eliminates a local government’s authority to renew a local franchise after January 2, 2008. At most, DIVCA establishes that the Commission alone can issue state franchises to provide video service – not that state franchises are the only video service franchises that may exist in the state of California. It is only those potential video service providers who previously have not been issued a franchise that are, without question, subject to the post January 2008 authority of the CPUC.

Dated: April 4, 2007

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**PROOF OF SERVICE**  
**Public Utilities Commission**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is One Frank H. Ogawa Plaza, 6th Floor, Oakland, California 94612. On April 4, 2007, I served the within document:

**CITY OF OAKLAND'S APPLICATION FOR REHEARING  
OF DECISION 07 -03-014**

- X    by transmitting via e-mail the document(s) listed above to be e-mailed as set forth below, or as stated on the attached service list, on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California addressed as set forth.
- by causing personal delivery by        of the document(s) listed above to the person(s) at the address(es) set forth below.
- ..    by personally delivering the document(s) listed above to the person(s) set forth below.

See Attached List

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 4, 2007, at Oakland, California.

/S/ LAURA GUERRERO

# CALIFORNIA PUBLIC UTILITIES COMMISSION

## Service Lists

**Proceeding: R0610005 - CPUC - CABLE TELEVIS**

**Filer: CPUC - CABLE TELEVISION**

**List Name: INITIALLIST**

**Last changed: March 28, 2007**

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